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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEONARD JAMES PITTMAN, Defendant and Appellant.	B216167 (Los Angeles County Super. Ct. No. BA312939)

THE COURT:*

Leonard James Pittman (appellant) appeals from the judgment entered following an order revoking his probation and imposing a four-year state prison sentence that resulted from his earlier plea of felony possession of marijuana for sale.

On November 20, 2006, appellant was arrested and subsequently charged by felony complaint with possession of marijuana for sale in violation of Health and Safety Code section 11359. The complaint also alleged that appellant had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).[1]

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* DOI TODD, Acting P. J., ASHMANN-GERST, J., CHAVEZ, J.

1 All subsequent statutory references are to the Penal Code unless otherwise specified.

Appellant pled no contest to the felony possession count and admitted that he had served one prior prison term. The trial court imposed a sentence of four years in state prison, suspended execution of the sentence, and placed appellant on formal probation subject to certain conditions, including that he not use or possess any narcotics or restricted drugs.

The following facts were adduced at a concurrent section 1538.5 and probation violation hearing, which took place on April 10, 2009: On January 9, 2009, Los Angeles Police Department (LAPD) Officer George Mejia observed appellant talking with a woman at the corner of Seventh Street and Stanford Avenue in Los Angeles. At one point a man approached appellant and the woman. The man handed the woman some green paper currency. The woman turned and looked at appellant. Appellant reached into his pants pocket and removed numerous off-white solids resembling cocaine base. Appellant held the solids in his open palm. The woman took one of the white solids from appellant's palm and gave it to the man. Upon observing this sequence of events, Officer Mejia instructed the officers who were working with him to detain the three individuals. One of those officers, Officer Chapman, detained appellant and recovered two off-white solids resembling cocaine base inside appellant's right front pants pocket. Appellant stipulated at the hearing that the solids recovered from his person contained cocaine base.

Appellant moved to suppress the cocaine base found on his person pursuant to section 1538.5.[2] The trial court denied the motion. The trial court further found that appellant had violated the terms of his probation by possessing cocaine base. The trial court imposed the previously suspended four-year sentence.

We appointed counsel to represent appellant on appeal. After examination of the record, counsel filed an "Appellant's Opening Brief" in which no issues were raised. On January 22, 2010, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider.

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[2] Section 1538.5 provides in relevant part: "(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: [¶] (A) The search or seizure without a warrant was unreasonable."

As best as we can distill, appellant argues the following in his letter brief to the court: (1) The trial court denied appellant his constitutional right to effective assistance of counsel when it denied his multiple motions to substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and (2) the trial court erred by denying appellant's motion to suppress.

I. Denial of *Marsden* Motions

"A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1244–1245.) We apply the "deferential abuse of discretion standard" when reviewing the denial of a motion to substitute counsel. (*Id*. at p. 1245.) "'Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel.' [Citations.]" (*People v. Hart* (1999) 20 Cal.4th 546, 603.)

On January 15, 2009, during arraignment, appellant claimed that he had a conflict with appointed counsel and requested substitute counsel under *Marsden*. The trial court ruled that there were "no grounds for a *Marsden* as this is just the arraignment." The trial court summarily denied the *Marsden* motion.

On January 26, 2009, appellant requested substitute counsel under *Marsden* on the ground that appointed counsel had refused to file a motion to suppress the recovered narcotics. During a closed session *Marsden* hearing, appointed counsel explained that he did not believe filing a motion to suppress was the "best strategic decision at the moment." The trial court denied the motion, stating: "I do believe that the public defender has appropriately represented [appellant]."

On February 9, 2009, appellant requested substitute counsel on the same ground that was previously raised and rejected in the prior *Marsden* hearing. The trial court again held a *Marsden* hearing without the prosecution present. During this hearing, the

trial court explained to appellant that appointed counsel was "one of the best defense attorneys there in that office" and would "never [shy] away from a 1538.5 if he thinks they're important." The trial court urged appellant to take some time to think about whether he wanted to discharge appointed counsel. Appellant responded that he had thought about the situation and wanted to exercise his right to self-representation under *Faretta v. California* (1974) 422 U.S. 806 (*Faretta*). After a lengthy examination, the trial court concluded that appellant knowingly, intelligently, and voluntarily waived his right to counsel and granted appellant's motion for self-representation.

We need not decide whether the trial court erred by denying appellant's first *Marsden* motion with additional inquiry because any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Chavez* (1980) 26 Cal.3d 334, 348–349 [*Marsden* does not establish a rule of per se reversible error].) Nothing that could have possibly affected the outcome of the probation revocation hearing took place between January 15, 2009, when appellant's first *Marsden* motion was summarily denied and January 26, 2009 (the next court date), when appellant made his second *Marsden* motion and was given a full opportunity to explain his reasons for requesting substitute counsel. Thus, any error that occurred in the denial of appellant's first *Marsden* motion was harmless beyond a reasonable doubt.

As to the trial court's denial of appellant's second and third *Marsden* motions, we conclude there was no abuse of discretion. Appellant's disagreement with appointed counsel about when and whether to file a motion to suppress essentially boiled down to a disagreement about strategy. Appellant believed that it was crucial to file a motion to suppress as soon as possible. His counsel apparently believed such a motion was not warranted. Disagreements over strategy are insufficient to warrant a substitution of counsel under *Marsden*. (*People v. Welch* (1999) 20 Cal.4th 701, 728–729 ["A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citations.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict'"];

People v. Lucky (1988) 45 Cal.3d 259, 281–282 ["There is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney"].)

II. Motion to Suppress

A police officer may detain a person if the officer has a reasonable and articulable suspicion that the person is or is about to be engaged in criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 21.) To satisfy this requirement, the police officer must "point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) Furthermore, the officer's suspicion must also be objectively reasonable, i.e., "'the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and same involvement by the person in question.'" (*People v. Aldridge* (1984) 35 Cal.3d 473, 478.) If the officer has such an objectively reasonable suspicion, a defendant's motion to suppress evidence seized in a search incident to the detention is properly denied. (*People v. Daugherty* (1996) 50 Cal.App.4th 275, 288–289.) "[I]n determining whether the search or seizure was reasonable on the facts found by the [trial court], we exercise our independent judgment." (*People v. McDonald* (2007) 137 Cal.App.4th 521, 529.)

Here, Officer Mejia testified that he saw appellant remove numerous off-white solids from his pants pocket after a woman handed him some currency that she had just received from a third party. The woman took one of the white solids from appellant's hand and gave it to the third party. Based on these observations, Officer Mejia, who had extensive experience investigating drug transactions, had a reasonable and articulable suspicion that appellant was engaging in criminal activity. Officer Chapman detained appellant based on Officer Mejia's suspicion and the detention was lawful. Because the

evidence seized from appellant resulted from a search incident to a lawful detention, the trial court properly denied appellant's motion to suppress.

Appellant has not raised a ground warranting reversal. We have examined the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment and order under review are affirmed.

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